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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER SOLORZANO,

Defendant and Appellant.

G054061

(Super. Ct. No. 12WF2492)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed and remanded with directions.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Convicted by a jury of two counts of first degree murder (Pen. Code, § 187, subd. (a)),¹ two counts of attempted murder (§§ 187, subd. (a), 664), and one count of street terrorism (§ 186.22, subd. (a)), along with gang and firearm related enhancements, defendant Javier Solorzano appeals after being sentenced to two consecutive terms of life without parole, multiple consecutive terms of 25 years to life, and two consecutive terms of seven years to life, and one consecutive term of five years for a prior serious felony. He asserts the evidence was insufficient, as a matter of law, to establish the required first degree murder element of premeditation and deliberation because it demonstrated he acted after being provoked.

On October 19, 2018, we issued an opinion affirming the judgment. Because of a legislative amendment to section 12022.53, subdivision (h), however, we remanded the matter to the court for the exercise of its discretion to strike, for sentencing purposes, the firearm allegations found true by the jury.

On January 23, 2019, the California Supreme Court granted review and transferred the matter to us “with directions to vacate [our] decision and reconsider the cause [in] light of Senate Bill No. 1393 (Stats. 2018, ch. 1013).” Senate Bill No. 1393 (S.B. 1393) took effect on January 1, 2019 and provides trial courts with discretion to strike five-year serious felony priors.

On January 25, 2019, pursuant to the direction by the Supreme Court, we vacated our prior decision. We now reissue our prior opinion (which had not addressed the five-year serious felony enhancement because the issue was not raised). In addition to our prior directions to the court on remand, we direct the court to exercise its discretion and decide whether to strike the prior serious felony enhancement. In all other respects,

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All further statutory references are to the Penal Code.

our decision regarding defendant's claims of error remains the same as the California Supreme Court's order does not affect the issues we previously considered.

FACTS

Late one night, a group of family and friends gathered at a house in Westminster, California, to socialize. Among those present were Christian Pedroza, a known affiliate of the Orphan criminal street gang, and a few of his cousins, including Jose and Yovany Fuentes.²

Pedroza and others were talking and drinking beer in the garage when Yovany decided to leave on his bicycle. A gray car approached the house on the street, and from inside the car someone yelled, "West Trece" and "Bullet." The group inside the garage ran out toward the street, Pedroza threw a marijuana pipe at the car, and Jose did the same with a beer bottle. The gray car drove off, but a second car which had been parked nearby drove fast toward Pedroza and the others with its lights off. Everyone at the house got out of the way of the oncoming car, and it sped off in the same direction as the gray car.

Approximately 10 minutes later, while Pedroza and others were still standing in the driveway of the house, two males wearing black hooded sweatshirts approached on foot, hiding behind parked cars along the way. Shots rang out. Pedroza's wife ran inside the house, called 911 and ran back out to the driveway area. She noticed the garage door was closed. When she opened it, she saw Pedroza lying face down on the ground.

Police arrived and found four men on the ground with gunshot wounds. Pedroza and Yovany ultimately succumbed to their wounds. The two others, including Jose, were treated at hospitals and survived.

² We refer to certain persons by first name to avoid confusion. No disrespect is intended.

Police officers interviewed Jose at the hospital. He relayed to an officer that “Bullet” was one of the two shooters and that “Bullet” shot five or more times. The other shooter fired three shots. Thereafter, Jose identified a picture of defendant as being that of “Bullet” and identified the other shooter in a photographic lineup

Defendant, who was known by law enforcement to be an active member of the West Trece criminal street gang and whose gang moniker was “Bullet,” was located by officers the morning after the shooting. After some surveillance, they arrested him. He asked that they not make “a big scene in front of [his] house,” and stated he knew “what this [was] about.”

The same day, defendant voluntarily spoke to police. He related that he knew the area where the shooting took place was West Trece gang territory and the particular house was occupied by Orphan gang members. Although initially he denied any involvement in the murders, he eventually admitted to being in the area on the night in question. He claimed he picked up a friend, and when someone threw a beer bottle at his car, he took off. Later that night someone told him about the shooting.

The next day, defendant again voluntarily spoke with a police detective. His story was different than it was the day before, and it further evolved during the course of the interview. Eventually he admitted to going by the house twice on the night of the shooting, accompanied by two others—“Hydro” and “Raul.” The first time they drove by, one male standing in the driveway supposedly held a machete, another had a long pole, and a third threw a beer bottle at defendant’s car. When defendant returned to the house on foot not long thereafter, he told the rival gang members on the driveway that he wanted “Travieso”—Pedroza’s nickname. According to defendant, the group “threw another thing at [him]” and “charged [him,]” and “that was it.” Defendant took a gun from Hydro, held it with his tank top so he would not leave fingerprints on it, fired multiple shots toward the group and then handed the gun back to Hydro. He claimed he felt threatened and acted in self-defense.

Defendant was charged with two counts of first degree murder (§ 187, subd. (a)), two counts of attempted murder (§§ 187, subd. (a), 664), and one count of street terrorism (§ 186.22, subd. (a)). In addition, it was alleged he committed the offenses for the benefit, at the direction of, or in association with a criminal street gang, with the specific intent to promote criminal conduct by gang members (§ 186.22, subd. (b)), and with that intent he vicariously discharged a firearm causing death (§ 12022.53, subds. (d) & (e)).

At trial, Pedroza's wife testified concerning the incident. She described the initial encounter, including the words yelled from the approaching car and the throwing of a marijuana pipe and beer bottle at the car. According to her, no one at the house had any other weapons.

Jose also testified about the series of events leading up to the shooting. He related that he and others were hanging out in the garage when a car driven by defendant passed by the house. He heard defendant yell "West Trece" and saw him almost run over Yovany. According to Jose, no one threw anything at the car and no one at the house had a weapon. After the car drove away, the group remained in the driveway area. A few minutes later, he heard gunshots and saw two males coming at them. He and the others retreated to the garage; no one ran toward the street or argued with the shooters before they started firing. Jose was shot in the back and testified he could not identify the shooters. Although he remembered speaking to police at the hospital shortly after the incident, he did not recall identifying defendant. But, he also stated he would have had no reason to lie to law enforcement.

Following testimony by police officers, forensic scientists, and a gang expert, as well as closing arguments, the jury deliberated and returned guilty verdicts on all counts charged. In addition, it found true the allegations concerning criminal street gang purposes and vicarious discharge of a firearm.

Based on the jury's verdict and defendant's admission prior to trial of one previous strike conviction (§§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), a prior serious felony conviction (§ 667, subd. (a)(1)), and two prison priors (§ 667.5, subd. (b)), the trial court sentenced defendant as follows: consecutive terms of life without parole on the two first degree murder counts, consecutive terms of 25 years to life on the gang firearm enhancements for those two counts, consecutive terms of seven years to life on the two attempted murder counts, and consecutive terms of 25 years to life on the gang firearm enhancements for those two counts. In addition, the court imposed a consecutive five-year term on the first murder count for the serious felony prior. It stayed the remaining enhancements and the sentence on the street terrorism count, and it struck the prior strike and prison priors for sentencing purposes.

DISCUSSION

Defendant contends the evidence demonstrated he was sufficiently provoked on the night of the killings such that any premeditation and deliberation on his part was negated as a matter of law, thereby precluding a first degree murder conviction. He also argues for retroactive application of a recent amendment to section 12022.53, which would require a remand to the trial court for the exercise of its discretion to strike, for sentencing purposes, the firearm allegations found to be true by the jury. Defendant's first contention is without merit, but we agree with the need for remand because the statutory amendments are retroactive.

Premeditation and Deliberation

“First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. [Citation.] Malice may be express (intent to kill) or

implied (intentional commission of life-threatening act with conscious disregard for life). [Citation.] Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation which elevate the killing to first degree murder.” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.)

Because the distinguishing elements are premeditation and deliberation, if the evidence demonstrates a murder resulted from the defendant being provoked by another’s conduct to a degree that negates his or her pensive and reflective mental state, then the crime is second degree murder. (*People v. Ward* (2005) 36 Cal.4th 186, 215; *People v. Hernandez, supra*, 183 Cal.App.4th at p. 1332.) This is distinguishable from a situation in which the provocation is such that a reasonable person would react with deadly passion—an objective standard. Under the latter circumstance, “the defendant is deemed to have acted without malice so as to further reduce the crime to voluntary manslaughter.” (*Ibid.*)

The test of whether provocation may negate deliberation and premeditation so as to reduce first degree murder to second degree murder is subjective. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) A key aspect is whether the defendant acted suddenly as a response to the provocation, and not belatedly after some reflection. (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) For example, evidence of “heated words . . . or a physical struggle . . . between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance.” (*Wickersham*, at p. 329.)

“[T]he relevant question on appeal is not whether *we* are convinced beyond a reasonable doubt, but whether *any* rational trier of fact could have been persuaded beyond a reasonable doubt that defendant premeditated the murder.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1127.) “[T]hree categories of evidence pertinent to the

determination of premeditation and deliberation [are] (1) planning activity, (2) motive, and (3) manner of killing.” (*Id.* at p. 1125.)

Here, the evidence of provocation was minimal. There was testimony that Pedroza threw a marijuana pipe at the car driven by defendant, Jose threw a beer bottle at it, and the two ran into the street as the car drove away after the initial encounter. But, multiple people testified that contact was initiated by the individuals in the two cars, one of whom was defendant. Knowing rival gang members lived in, and frequented, the house, they approached unexpectedly at night while Pedroza and others were socializing in the garage, and defendant yelled out the name of his gang and his gang moniker. Jose, his mother, and Pedroza’s wife each testified no one at the house displayed a weapon and the entire group remained at the house after the drive by. And approximately 10 minutes passed before defendant and at least one other male approached the house from down the street, hiding between cars so as not to be seen, and fired at the group.

“Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief.” (*People v. Sanchez* (2001) 26 Cal.4th 834, 849; see *People v. Lenart* (2004) 32 Cal.4th 1107, 1127 [“We have never required that there be an extensive time to premeditate and deliberate”]; see also *People v. Perez, supra*, 2 Cal.4th at p. 1127 [“premeditation can occur in a brief period of time”].) There was ample evidence from which a reasonable jury could conclude that defendant’s actions were the result of the requisite premeditation and deliberation, not a rash and spontaneous reaction to provocation. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 404, 413 [purposefully driving up to rival gang members, aiming gun at them and shooting is sufficient to constitute premeditation and deliberation].) In other words, we cannot say the provocation was sufficient, as a matter of law, to preclude a finding that defendant acted with premeditation and deliberation. (*People v. Perez, supra*, 2 Cal.4th at p. 1127.)

Firearm Enhancements

Signed into law in 2017, Senate Bill No. 620 (2017-2018 Reg. Sess.) amended section 12022.53 to give the trial court authority to strike, in the interest of justice, a firearm enhancement allegation found to be true. Effective January 1, 2018, subdivision (h) of the amended statute provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 2.)

In a supplemental brief, defendant argues the amendment to section 12022.53 applies to him because his case is not yet final on appeal, citing the rule of *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*). The Attorney General agrees, as do we. Accordingly, remand is necessary to allow the trial court to exercise its newly authorized sentencing discretion. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091 [amendment § 12022.53 applied retroactively].)

Prior Serious Felony Enhancement

Defendant’s sentence in this case includes a five-year prior serious felony enhancement pursuant to section 667, subdivision (a)(1). At the time of defendant’s sentencing, the court had no power to strike or dismiss the five-year serious felony prior. While this appeal was pending, the Governor signed S.B. 1393 into law, which took effect on January 1, 2019. S.B. 1393 amends sections 667, subdivision (a) and section 1385, subdivision (b) so the court may now, in its discretion, strike or dismiss a prior serious felony conviction for sentencing purposes.

Although the People have not expressed their view on the matter in supplemental briefing in this case, the Attorney General has conceded the *Estrada* rule of

retroactivity applies to S.B. 1393. (See, e.g., *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We agree S.B. 1393 applies retroactively and that remand is necessary so the court may exercise its discretion and decide whether to strike the prior serious felony enhancement.

DISPOSITION

We remand for the limited purpose of allowing the court to exercise its sentencing discretion under section 12022.53, subdivision (h), concerning whether to strike the firearm enhancements. The court also is directed to exercise its discretion under S.B. 1393 whether to strike the prior serious felony enhancement pursuant to sections 667, subdivision (a) and 1385, subdivision (b). The judgment is otherwise affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.